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Fourth Place: Khalid Khawar v. Globe International, INC.

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KHALID KHAWAR,
Plaintiff and Respondent,
v.
GLOBE INTERNATIONAL, INC.,
Defendant and Petitioner.

Counsel for Respondent

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
<u>Preliminary Statement</u>	1
<u>Statement of Facts</u>	2
QUESTIONS PRESENTED	5
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I. THE COURT OF APPEAL CORRECTLY DECIDED THAT MR. KHAWAR IS NEITHER A GENERAL, LIMITED PURPOSE, NOR INVOLUNTARY PUBLIC FIGURE	7
A. <u>Mr. Khawar Is Not A General Or Limited Purpose Public Figure Because He Did Not Thrust Himself To The Forefront Of The Controversy</u>	8
B. <u>The United States Supreme Court Has Rejected The Idea That A Private Individual Can Be Transformed Into A Public Figure Simply By Involuntary Involvement In, Or Association with, A Matter Of Public Interest</u>	13
II. THE JURY'S FINDING OF ACTUAL MALICE IS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD THAT JUSTIFIES THE PUNITIVE DAMAGE AWARD IN MR. KHAWAR'S FAVOR	15
A. <u>Globe Acted With Actual Malice Because Globe Had Knowledge Of The Probable Falsity Of The Article And Displayed A Reckless Disregard For The Truth</u>	17

TABLE OF CONTENTS, Cont.

	<u>Page</u>
III. IN RECOGNITION OF INDIVIDUAL PRIVACY RIGHTS, THIS COURT HAS NOT ADOPTED, AND SHOULD NOT NOW ADOPT, THE NEUTRAL REPORTAGE PRIVILEGE	21
A. <u>The Newsworthy Requirement Of The Neutral Reportage Privilege Is Inconsistent With The United States Supreme Court's Focus On The Status Of The Individual Defamed</u>	23
B. <u>The Neutral Reportage Privilege Is Inconsistent With The California Constitution</u>	27
C. <u>Extension Of The Neutral Reportage Privilege To Private Individuals Is Inconsistent With Existing Public Policy</u>	29
D. <u>Even The Court That Created The Neutral Reportage Privilege Has Noted That The Privilege Should Be Narrowly Construed</u>	31
IV. EVEN IF THIS COURT ADOPTS THE NEUTRAL REPORTAGE PRIVILEGE, IT IS NOT A DEFENSE FOR GLOBE'S CONDUCT IN THIS CASE	33
A. <u>Globe Has Not Satisfied The Neutral Reportage Privilege Requirement That The Allegations Against Mr. Khawar Be Both Newsworthy And Associated With A Public Controversy</u>	33
B. <u>Globe Has Not Satisfied The Neutral Reportage Privilege Requirement That The Allegations Be Made By A Responsible And Prominent Source</u>	35
C. <u>Globe Has Not Satisfied The Neutral Reportage Privilege Requirement That The Allegations Be Reported Neutrally And Accurately</u>	36
1. <u>Globe neglected to follow customary industry practices to ensure the accuracy of its article</u>	36

TABLE OF CONTENTS, Cont.

	<u>Page</u>
2. <u>Republication of a defamatory statement originally made by another is not a defense to liability</u>	38
D. <u>Globe Has Not Satisfied The Final Requirement Of The Neutral Reportage Privilege That The Allegations Concern A Public Official Or Public Figure</u>	39
CONCLUSION	40

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
UNITED STATES SUPREME COURT	
<u>Bose v. Consumer's Union of United States, Inc.,</u> 464 U.S. 485 (1984)	7,16
<u>Gertz v. Robert Welch, Inc.,</u> 418 U.S. 323 (1974)	<u>passim</u>
<u>New York Times v. Sullivan,</u> 376 U.S. 254 (1964)	<u>passim</u>
<u>Rosenblatt v. Baer,</u> 383 U.S. 75 (1966)	23,30,31
<u>Rosenbloom v. Metromedia, Inc.,</u> 403 U.S. 29 (1971)	13
<u>St. Amant v. Thompson,</u> 390 U.S. 727 (1968)	16
<u>Time, Inc. v. Firestone,</u> 424 U.S. 448 (1976)	<u>passim</u>
<u>Wolston v. Reader's Digest Ass'n, Inc.,</u> 443 U.S. 157 (1979)	<u>passim</u>
FEDERAL CIRCUIT COURTS	
<u>Cianci v. New Times Publ'g Co.,</u> 639 F.2d 54 (2d Cir. 1980)	<u>passim</u>
<u>Dickey v. CBS Inc.,</u> 583 F.2d 1221 (3d Cir. 1978)	23,34
<u>Edwards v. Nat'l Audubon Soc'y, Inc.,</u> 556 F.2d 113 (2d Cir. 1977)	<u>passim</u>
<u>Foretich v. Capital Cities/ABC, Inc.,</u> 37 F.3d 1541 (4th Cir. 1994)	12
FEDERAL DISTRICT COURTS	
<u>Barry v. Time, Inc.,</u> 584 F. Supp. 1110 (N.D. Cal. 1984)	39

TABLE OF AUTHORITIES, Cont.

	<u>Page</u>
CALIFORNIA SUPREME COURT	
<u>Brown v. Kelly Broad. Co.</u> , 48 Cal. 3d 711 (1989)	<u>passim</u>
<u>Reader's Digest Ass'n v. Superior Court</u> , 37 Cal. 3d 244 (1994)	8
CALIFORNIA COURTS OF APPEAL	
<u>Antonovich v. Superior Court</u> , 234 Cal. App. 3d 1041 (1991)	16,17
<u>Denney v. Lawrence</u> , 22 Cal. App. 4th 927 (1994)	12
<u>Weingarten v. Block</u> , 102 Cal. App. 3d 129 (1980)	8
CONSTITUTIONAL PROVISIONS	
Cal. Const. art. I, § 2, subd. (a)	27
MISCELLANEOUS	
Ray Worthy Cambell, Note, <u>The Developing Privilege of Neutral Reportage</u> , 69 Va. L. Rev. 853 (1983)	23
Dennis J. Dobbels, Comment, <u>Edwards v. National Audubon Society, Inc.: A Constitutional Privilege to Republish Defamation Should be Rejected</u> , 33 Hastings L.J. 1203 (1982)	26,28
Rodney A. Nelson, Comment, <u>Neutral Reportage: Making Sense of Edwards v. National Audubon Society, Inc.</u> , 20 Cap. U. L. Rev. 471 (1991) . . .	22

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KHALID KHAWAR,)
)
Plaintiff and Respondent,)
)
v.)
)
GLOBE INTERNATIONAL, INC.,)
)
Defendant and Petitioner)
_____)

RESPONDENT'S ANSWER BRIEF ON THE MERITS

STATEMENT OF THE CASE

Preliminary Statement

On March 31, 1990, Khalid Khawar filed an amended complaint for defamation against Globe International, Inc., Roundtable Publishing, publisher of a book entitled The Senator Must Die: The Murder of Robert F. Kennedy, and Robert Morrow, author of that book. (C.T. 141, 137.) The suit alleged that Defendants had defamed Mr. Khawar by accusing him of conspiring, in June of 1968, to assassinate Robert F. Kennedy. (C.T. 138.) Mr. Khawar alleged that Globe published an article and accompanying photograph depicting Mr. Khawar as Senator Kennedy's assassin. (C.T. 139.) Globe's article, published in April, 1989, was predicated on Morrow's book. (C.T. 139.) Prior to trial, Mr. Khawar reached a settlement with Roundtable Publishing and a

default judgment was entered against Robert Morrow. See Khawar v. Globe Int'l, Inc., 51 Cal. App. 4th 14, 21 (1996).

At trial, the jury found in favor of Mr. Khawar and against Globe. (C.T. 2781-83.) The jury awarded Mr. Khawar punitive damages of \$500,000 and compensatory damages of \$675,000. (C.T. 2783, 91.) The judgment was entered on April 15, 1994. (C.T. 3110.)

Globe filed a timely notice of appeal. (C.T. 3130.) The Court of Appeal affirmed the judgment in its entirety, finding (1) Mr. Khawar was a private figure; (2) there was substantial evidence to support the jury's findings that Globe published the article with malice; (3) California had not adopted the neutral reportage privilege with respect to private figures; and (4) Globe was liable for defamation for republishing a defamatory statement. See Khawar, 51 Cal. App. 4th at 14-15.

This Court granted review on September 25, 1996.

Statement of Facts

On June 4, 1968, Respondent Mr. Khawar, an amateur photojournalist for a Pakistani publication, was at the Ambassador Hotel in Los Angeles. (R.T. 1336.) Mr. Khawar was photographing Senator Kennedy, who had just won the California primary. (R.T. 2735.) When Senator Kennedy left the podium and proceeded to the pantry area of the Ambassador hotel, Mr. Khawar remained on the podium to reload his camera. (R.T. 2735, 1341.)

A gunman in the pantry area assassinated Senator Kennedy while Mr. Khawar remained on the podium. (R.T. 2735.) Police prevented Mr. Khawar from entering the pantry area. (R.T. 1341.) A review of the investigations undertaken by the Los Angeles Police Department and the Federal Bureau of Investigation provides no indication that Mr. Khawar was present in the pantry area at the time of the assassination. (R.T. 702.)

In November, 1988, twenty years after the assassination of Senator Kennedy, Morrow authored a book entitled The Senator Must Die: The Murder of Robert F. Kennedy. (C.T. 138.) The book was published by Roundtable Publishing. (C.T. 138.) In the book, Morrow alleged that the Iranian Secret Police had conspired with the Mafia to assassinate Senator Kennedy. (C.T. 143-73.) Morrow named Mr. Khawar (referred to as "Ali Ahmand" and "Khalid Iqbal" in the book) as the true assassin of Senator Kennedy. (C.T. 143-73; R.T. 1123.) Morrow's book included pictures of Mr. Khawar standing near Senator Kennedy on the night of the assassination. (C.T. 143-73.)

In April of 1989, a former employee of Mr. Khawar told him that he had seen Mr. Khawar's picture in a magazine. (R.T. 1357.) Mr. Khawar subsequently discovered that on April 4, 1989, Globe had published an article with the heading "Former CIA agent claims: IRANIANS KILLED BOBBY KENNEDY FOR THE MAFIA."

(Plaintiff's Exhibit B.) An enhanced photograph of Mr. Khawar accompanied the article. (Plaintiff's Exhibit B.) A superimposed arrow pointed to Mr. Khawar, identifying him as the Iranian agent who had used a gun disguised to look like a camera to assassinate Senator Kennedy. (Plaintiff's Exhibit B.) Mr. Khawar ignored the article and its accusations, hoping it would be forgotten. (R.T. 1355, 1362.) Subsequently, however, Mr. Khawar received several threatening phone calls and his property was vandalized. (R.T. 1367.) In order to clear his name, Mr. Khawar filed this suit. (R.T. 1368.)

QUESTIONS PRESENTED

1. Whether the court of appeal correctly decided that Mr. Khawar is a private figure because his mere association with Senator Kennedy's assassination is insufficient to elevate him to the status of a public figure.
2. Whether the jury's finding of actual malice is supported by substantial evidence that justifies the punitive damage award in Mr. Khawar's favor.
3. Whether this Court should reject the neutral reportage privilege, a defense not recognized by the Supreme Court, in order to preserve the integrity of individual privacy rights under the First Amendment.

SUMMARY OF ARGUMENT

The court below correctly held that Mr. Khawar is neither a general, limited purpose, nor involuntary public figure. Mr. Khawar's mere presence on the podium near Senator Kennedy on the night of the assassination is not sufficient to deprive Mr. Khawar of his status as a private individual. This Court should follow the rationale of the Supreme Court and find that Mr. Khawar did not become an involuntary public figure merely because the controversy surrounding Senator Kennedy's assassination is of public interest. Rather, this Court should affirm the holding of the lower court and find that Mr. Khawar is a private individual.

The jury's finding of actual malice is supported by substantial evidence in the record and justifies the punitive damage award in Mr. Khawar's favor. The record shows that Globe's editors possessed a subjective awareness of the probable falsity of the article, yet published it without regard for Mr. Khawar's reputation. Globe's failure to confirm the defamatory allegations made in the article, coupled with Globe's failure to substantiate its alterations to Morrow's book, supports the jury's finding of actual malice. Accordingly, this Court should affirm the award of punitive damages in Mr. Khawar's favor.

The neutral reportage privilege, argued for by Petitioner, should not be adopted in California. The privilege, which

focuses on the newsworthiness of a defamatory publication, rather than the status of the individual defamed, is inconsistent with the Supreme Court's defamation analysis. The privilege has been explicitly rejected because it ignores the delicate balance between societal and individual constitutional protections. Moreover, the privilege is contrary to public policy because it immunizes the media from liability for defaming innocent individuals. Even if this Court adopts the privilege, Globe cannot meet its burden of satisfying the four elements required to assert the privilege. Accordingly, this Court should affirm the lower court's holding and find that Globe is precluded from asserting a neutral reportage privilege defense.

ARGUMENT

- I. THE COURT OF APPEAL CORRECTLY DECIDED THAT MR. KHAWAR IS NEITHER A GENERAL, LIMITED PURPOSE, NOR INVOLUNTARY PUBLIC FIGURE.

The question of whether or not a person is a public figure involves constitutional principles of free speech and thus is a mixed question of law and fact. See New York Times v. Sullivan, 376 U.S. 254, 285 (1964). The issue must be reviewed de novo to ensure that constitutional principles have been properly applied. See id. at 285; see also, Bose v. Consumers Union of United States, Inc., 466 U.S. 485 (1984). Accordingly, the appropriate standard of review is whether, after an independent

review of the record, substantial evidence supports the lower court's decision. Weingarten v. Block, 102 Cal. App. 3d 129, 134-35 (1980).

This Court has observed that private individuals have less opportunity than public officials or public figures to effectively counteract false statements. See Brown v. Kelly Broadcasting Co., 48 Cal. 3d 711, 744 (1989). As a result of this imbalance, private individuals are more vulnerable to injury. See id. Consequently, this Court has recognized that a "reasonable degree of protection for a private individual's reputation is essential to our system of ordered liberty." Id. To preserve private individuals' privacy and reputation, it is essential that this Court enforce a high threshold for elevating private individuals to public figure status. In determining whether individuals are public figures, this Court should require evidence of "affirmative action by which purported public figures have thrust themselves into the forefront of particular public controversies." Reader's Digest Ass'n v. Superior Court, 37 Cal. 3d 244, 255 (1984).

A. Mr. Khawar Is Not A General Or Limited Purpose Public Figure Because He Did Not Thrust Himself To The Forefront Of The Controversy.

Mr. Khawar is not a general public figure because he did not achieve "such pervasive fame or notoriety that he [became] a public figure for all purposes and in all contexts." Gertz v.

Robert Welch, Inc., 418 U.S. 323, 351 (1974). Persons who fall into the category of general public figure have usually "assumed roles of especial prominence in the affairs of society." Id. at 345. "Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life." Id. Mr. Khawar's very limited role in the events surrounding the assassination of Senator Kennedy simply does not elevate him to the status of a general public figure.

Mr. Khawar does not conform to the description of a limited purpose public figure. In determining whether an individual is either a general or a limited purpose public figure, a court should "look to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." Id. at 352. Limited purpose public figures are those who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." Id. at 345. Mr. Khawar is not a limited purpose public figure because he did not take the requisite affirmative action. Accordingly, this Court should affirm the lower court finding that Mr. Khawar was a private individual, not a public figure.

Petitioner argues that Mr. Khawar's mere act of standing near Senator Kennedy on the podium at the rally justifies labeling him a limited purpose public figure. The case law, however, does not support such an argument. An individual is not a public figure merely because he happens to be involved in a controversy that is newsworthy. See Time, Inc. v. Firestone, 424 U.S. 448, 454 (1976). In order to prove that a plaintiff achieved limited purpose public figure status, the defendant must show that the plaintiff voluntarily "thrust himself into the vortex of a public issue [and engaged] the public's attention in an attempt to influence its outcome." Gertz, 418 U.S. at 352. In this case, however, Mr. Khawar did not engage in the type of affirmative action required by Gertz. Accordingly, this Court should not elevate Mr. Khawar to the status of a public figure.

In Gertz, the United States Supreme Court held that an attorney was not a public figure even though his representation of his client amounted to voluntary association with a public controversy. 418 U.S. at 352. To paraphrase the Court, Mr. Gertz was merely doing his job. See id. Similarly, Mr. Khawar, by attending the Kennedy rally, was simply doing his job. Mr. Khawar went to the rally because, as an amateur journalist for a Pakistani newspaper and a self-proclaimed student of American culture, he wanted to document the event. (R.T. 1336.) It is

true that Mr. Khawar positioned himself close to Senator Kennedy for optimum photo opportunities, but it would require a great leap for this Court to determine that this action alone constitutes the requisite "thrusting of oneself into the vortex of a public issue." As Mr. Khawar stood next to Senator Kennedy on the podium, he could not have predicted the assassination and the controversy that would follow.

Even if this Court were to accept that Mr. Khawar's minimal participation in the events surrounding Senator Kennedy's assassination elevated him to a limited purpose public figure, the passage of twenty years should negate that conclusion. By the time the Globe article was published in 1989, Mr. Khawar's image had likely faded from the memories of any individuals who might have recognized him as the "man in the yellow sweater" that day on the podium.

Moreover, Mr. Khawar's appearance on a local television show is not relevant to the determination of whether he is a limited purpose public figure because it occurred after the Globe article was published. The United States Supreme Court has recognized that "[t]he first remedy of any victim of defamation is self-help; that is, the use of available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation." Gertz, 418 U.S. at 344. The Fourth Circuit has refused to "attribute

public figure status to otherwise private persons merely because they responded to . . . accusations in a reasonable attempt to vindicate their reputations." Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1558 (4th Cir. 1994). The Foretich court followed the Gertz Court's advice to formulate "broad rules of general application" to accommodate the competing interests of press and personal reputation. Id. (quoting Gertz, 418 U.S. at 343). The alternative, assessing each defendant on an ad hoc basis, "would lead to unpredictable results and uncertain expectations." Gertz, 418 U.S. at 344. This Court should find that Mr. Khawar's decision to appear on local television news was a reasonable attempt to minimize the effects of Globe's widely-distributed attack on his reputation. Mr. Khawar's use of the shield of self-help should not be used as a sword against him.

Mr. Khawar's interaction with the press is distinguishable from that of the plaintiff in a leading case addressing the limited purpose public figure question. See Denney v. Lawrence, 22 Cal. App. 4th 927 (1994). In Denney, the court held that the plaintiff, the brother of an accused murderer, was a limited purpose public figure because he gave interviews to the press in an attempt "to influence public opinion as to the circumstances surrounding the killing and his brother's culpability, if any, for the homicide." Id. at 936. Unlike the plaintiff in Denney,

however, Mr. Khawar made no attempts to influence public debate. Mr. Khawar's only intent in appearing on the local television show was to rebut the allegations in the article. Accordingly, this Court should find that Mr. Khawar's television appearance does not raise him to the level of a limited purpose public figure.

- B. The United States Supreme Court Has Rejected The Idea That A Private Individual Can Be Transformed Into A Public Figure Simply By Involuntary Involvement In, Or Association With, A Matter Of Public Interest.

This Court should not find Mr. Khawar to be an involuntary public figure because to do so would result in the resurrection of a standard emphatically rejected by the United States Supreme Court. In Rosenbloom v. Metromedia, 403 U.S. 29, 44 (1971), the Supreme Court held that a private individual is transformed into a public figure whenever defamatory falsehoods concern matters of general or public interest. In the years since Rosenbloom, however, the Supreme Court has consistently repudiated this proposition. See, e.g., Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 167 (1979) (holding that a private individual is not automatically transformed into a public figure just by becoming involved in, or associated with, a matter that attracts public attention); Gertz, 418 U.S. at 346 (holding that the public or general interest test for determining the applicability of the New York Times standard to private defamation actions

inadequately serves the competing values at stake). This Court should follow the current reasoning of the Supreme Court and refuse to attribute involuntary public figure status to Mr. Khawar merely because the controversy surrounding the assassination of Senator Kennedy is of public interest.

In Wolston, for example, a publication referred to the plaintiff as a Soviet spy because he failed to respond to a grand jury subpoena in a Soviet spy investigation. 443 U.S. at 159, 162, 166. The Court, in refusing to label the plaintiff a public figure, stated that "it would be more accurate to say that petitioner was dragged unwillingly into the controversy." Id. at 166. To label Wolston a public figure, the Court reasoned, would reestablish the doctrine adopted in Rosenbloom and subsequently rejected in Gertz. See id. at 167. "A private individual is not automatically transformed into a public figure just by becoming involved in a matter that attracts public attention." Id. Therefore, this Court should not ascribe involuntary public figure status to Mr. Khawar simply because he became unwillingly involved in the controversy surrounding Senator Kennedy's assassination.

In Gertz, the Supreme Court made fleeting reference to the possible existence of involuntary public figures. 418 U.S. at 345. The Court acknowledged, however, that while "hypothetically, it may be possible for someone to become a

public figure through no purposeful action of his own, . . . the instances of truly involuntary public figures must be exceedingly rare." Id. The Court did not indicate how an individual might become an involuntary public figure. Indeed, the Court has not to this date actually assigned the involuntary public figure label to any individual. Mr. Khawar's relatively minor involvement in the events surrounding the assassination of Senator Kennedy, coupled with the Supreme Court's apparent reluctance to assign involuntary public figure status, simply does not justify the conclusion that Mr. Khawar became one of the nebulous and rare involuntary public figures hinted at in Gertz.

II. THE JURY'S FINDING OF ACTUAL MALICE IS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD THAT JUSTIFIES THE PUNITIVE DAMAGE AWARD IN MR. KHAWAR'S FAVOR.

Substantial evidence in the record supports a finding by a reasonable jury that Globe acted with actual malice. The jury found that Mr. Khawar proved by clear and convincing evidence that Globe published the defamatory article either knowing that the statements therein were false, or with reckless disregard for whether the statements were true or false. (C.T. 2782.) Based on its finding of actual malice, the jury awarded Mr. Khawar punitive damages in the amount of \$500,000. (C.T. 2791.) "The question whether the evidence in the record . . . is sufficient to support a finding of actual malice is a question

of law." Bose, 466 U.S. at 510-511. Therefore, this Court should review all of the evidence on the issue of malice de novo.

In order to be eligible for punitive damages, both public figures and private individuals must satisfy the New York Times actual malice requirement. See Gertz, 418 U.S. at 349. The Supreme Court has observed, however, that actual malice is a difficult concept to encompass in one infallible definition. See St. Amant v. Thompson, 390 U.S. 727, 730 (1968). In New York Times, the Court defined actual malice as publication of a defamatory falsehood with "knowledge that it [is] false or with reckless disregard of whether it [is] false or not." 376 U.S. at 279-280. The Court has equated reckless disregard of the truth with a subjective awareness of probable falsity: "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubt as to the truth of his publication." St. Amant, 390 U.S. at 731. Another court held that "inaction, i.e., failure to investigate, which was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of charges will support a finding of actual malice." Antonovich v. Superior Court, 234 Cal. App. 3d 1041, 1048 (1991).

As this Court recognized in Brown, private individuals have less opportunity than public figures and public officials to

effectively counteract false statements, and are more vulnerable to injury. 48 Cal. 3d at 744. In order to effectively protect private individuals from such injury, this Court should follow the rationale of the court of appeal in Antonovich. This Court should find that Globe's failure to confirm the defamatory allegations made in the article, as well as Globe's failure to substantiate its alterations to Morrow's book, supports a finding of actual malice.

A. Globe Acted With Actual Malice Because Globe Had Knowledge Of The Probable Falsity Of The Article And Displayed A Reckless Disregard For The Truth.

This Court should follow the rationale of the Antonovich court and find that Globe acted with actual malice because Globe's deliberate decision not to investigate the defamatory allegations implies a subjective awareness of probable falsity. In Antonovich, the defendant alleged that the plaintiff, an unsuccessful political opponent, removed or destroyed files prior to vacating his office. 285 Cal. App. 3d at 1051. The plaintiff showed, however, that contrary to the allegations, the defendant was aware that the files remained even after the plaintiff vacated the office. See id. The court found that the defendant's failure to investigate suggested that he lacked a subjective good faith belief in the truth of his defamatory allegations. See id. Similarly, this Court should find that Globe's failure to investigate the veracity of the allegations

contained in the article, coupled with Globe's arbitrary modifications to Morrow's book, amounts to a deliberate decision not to confirm the probable falsity of the charges.

Like the defendant in Antonovich, Globe possessed an awareness of the probable falsity of the defamatory allegations, but made no attempt to investigate their veracity. John Blackburn, the author of the article, testified that he could not recall whether anybody from Globe questioned the basis of Morrow's allegations. (R.T. 1132.) John McSweeney, an expert witness for Mr. Khawar, testified that acceptable standards of professional journalism dictate that when a news story makes controversial accusations against an individual, the newspaper must present a balanced story by providing the individual accused with an opportunity to respond. (R.T. 798.) According to Mr. McSweeney, standards of professional journalism dictate that "any story as sloppy as this is and as unbalanced as this is and as vague about [its sources as this is] . . ." should be discarded. (R.T. 795.) Indeed, Robert Blair Kaiser, a newspaper columnist, testified that Morrow's theory had "zero credibility." (R.T. 2152.) Mr. Kaiser stated: "It seemed he made the whole thing up . . . there was no evidence at all in the book, and there was [a] lot[] of evidence outside the book, from my own investigation, that Mr. Iqbal was never in the Ambassador pantry during the shooting." (R.T. 2152.) Moreover,

Globe's failure to investigate, despite the obvious bias and flimsy factual foundation reflected in the article, indicates a reckless disregard for the truth or falsity of the statements. Accordingly, this Court should find that Globe's failure to investigate evidences a subjective awareness of the probable falsity of the charges.

Globe's failure to investigate is further illustrated by Blackburn's failure to make a good faith effort to contact Mr. Khawar. As discussed above, Globe should have made a good faith attempt to both verify the allegations and provide Mr. Khawar with an opportunity to respond. (R.T. 798.) Admittedly, there was some confusion surrounding Mr. Khawar's true name: in the Morrow book and the Globe article, Mr. Khawar is referred to as "Ali Ahmand" and "Khalid Iqbal." (R.T. 1123.) The index to the Morrow book identifies "Ali Ahmand" and "Khalid Iqbal" as being the same person. (R.T. 1123.) As the record shows, however, Blackburn could have located Mr. Khawar with only a few minutes of investigation. See Khawar, 51 Cal. App. 4th at 32. At trial, Blackburn testified that he "believed" he checked with Los Angeles Directory Assistance and was told that there was no "Ahmand" listing. (R.T. 1121.) Had Blackburn simply looked at the index to the Morrow book and asked Los Angeles Directory Assistance for an "Iqbal" listing, he would have reached a relative of Mr. Khawar who would have informed Blackburn that

Khalid Iqbal and Khalid Khawar were one and the same. See Khawar, 51 Cal. App. 4th at 32. Blackburn's failure to perform even these minor investigative steps falls far below acceptable standards of professional journalism. Thus, this Court should find that Globe's publication of this biased article implies a deliberate decision not to investigate facts that might confirm the falsity of the charges.

Moreover, Globe's reckless disregard for the truth is illustrated by Globe's modifications to Morrow's book. A Globe editor changed Morrow's job title from "CIA operative" in the reporter's copy of the article to "CIA agent" in the published news story. (R.T. 1091.) Mr. McSweeney testified that "calling somebody a former CIA agent has a lot more impact to it than CIA operative." (R.T. 809.) Globe's intentional publication of a fact it knew to be false emphasizes Globe's reckless disregard for the truth. Thus, this Court should find that Globe acted with actual malice.

Globe's claim that its sources were reliable is compromised by the inconsistencies in Blackburn's testimony. At trial, when asked whether he had interviewed three key sources listed in Morrow's book, Blackburn testified that he could not recall. (R.T. 1140.) Each source testified that he was not contacted by anyone from Globe. Khawar, 51 Cal. App. 4th at 32. In addition, Globe's apparent dissatisfaction with Morrow's

pedigree (as a mere CIA operative) indicates a subjective lack of good faith in Morrow's credibility. This Court should find that Globe's failure to contact key sources and its willingness to falsify information indicates a reckless disregard for the truth.

The evidence in the record more than supports the jury's finding that Globe possessed actual malice. The foregoing facts emphasize Globe's awareness of the probable falsity of the allegations and Globe's subsequent decision not to acquire knowledge of facts that might confirm this falsity. Blackburn's failure to contact Mr. Khawar and other important sources indicates a failure to investigate. Globe's modification of Morrow's book signifies a reckless disregard for the truth and credibility of Globe's sources. These facts underscore Globe's deliberate decision not to acquire knowledge of the facts that would reveal the falsity of the charges. Accordingly, this Court should affirm the findings of the court below and hold that the award of punitive damages was proper.

III. IN RECOGNITION OF INDIVIDUAL PRIVACY RIGHTS, THIS COURT HAS NOT ADOPTED, AND SHOULD NOT NOW ADOPT, THE NEUTRAL REPORTAGE PRIVILEGE.

The neutral reportage privilege was established as a defense to defamation liability by the Second Circuit Court of Appeals. See Edwards v. Nat'l Audubon Soc'y, Inc., 556 F.2d 113, 120 (1977). The privilege has not yet been recognized as a

legitimate defense by the United States Supreme Court. Whether such privilege exists or not is a question of first impression by this Court, and should therefore be reviewed de novo. This Court "must make an independent examination of the whole record, so as to assure [itself] that the judgment does not constitute a forbidden intrusion on the field of free expression." New York Times, 376 U.S. at 285.

Under the neutral reportage privilege, reporters can republish fair and accurate reports of false, defamatory statements, regardless of the reporter's subjective awareness of the statements' falsity. See Edwards, 556 F.2d at 120. In Edwards, the court extended the First Amendment to the common law privilege of fair report.¹ See id. The Edwards court provided constitutional immunity to reporters of information relevant to the public interest. See id. This decision, however, ignores the equally important policy that one should enjoy one's reputation, unimpaired by defamatory attacks. In recognition of this fundamental right to privacy, which Edwards failed to address, one Supreme Court justice noted that, "the right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our

¹ The common law privilege of fair report was established as a qualified protection for fair and accurate republishings of defamatory statements made in public governmental meetings or in judicial documents. See Rodney A. Nelson, Comment, Neutral Reportage: Making

basic concept of the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty." Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

The neutral reportage privilege has not been well received by the courts. See Ray Worthy Cambell, Note, The Developing Privilege of Neutral Reportage, 69 Va. L. Rev. 853, 863 (1983). Some courts have explicitly refused to adopt the privilege because its newsworthiness requirement conflicts with the Supreme Court's constitutional framework for protecting freedom of expression in defamation cases.² See id. This Court should therefore consider the Supreme Court's likely rejection of the neutral reportage privilege in reviewing whether or not to adopt the privilege in California.

A. The Newsworthy Requirement Of The Neutral Reportage Privilege Is Inconsistent With The United States Supreme Court's Focus On The Status Of The Individual Defamed.

In the seminal New York Times decision, the Supreme Court first addressed the conflict between the public's interest in the free exchange of information and an individual's interest in being protected from defamation. 376 U.S. at 256. The Court

Sense of Edwards v. Nat'l Audubon Soc'y, Inc., 20 Cap. U. L. Rev. 471 (1991).

² For the leading federal case rejecting the neutral reportage privilege based on the inconsistency of the newsworthy requirement with the Supreme Court decisions in Gertz and St. Amant, see Dickey v. CBS Inc., 583 F.2d 1221 (3rd Cir., 1978).

held that in order to provide "breathing space" for freedom of expression, a public official must prove actual malice in order to recover damages for defamation. See id. at 279-80. The Court focused on the status of the public official in order to determine if protection should have been granted under the First Amendment. See id. The Court's rationale in New York Times thereby set the groundwork for affording constitutional protection to defamation defendants based upon an examination of the plaintiff's status.

Subsequent Supreme Court cases demonstrate that the Court has consistently focused on the plaintiff's status in deciding whether a defamatory publication is protected by the First Amendment. See Gertz, 418 U.S. at 345-48; Firestone, 424 U.S. at 157; Wolston, 443 U.S. at 166-69. These cases repudiated a First Amendment protection standard based on a newsworthiness test. This Court should reject the neutral reportage privilege and follow the Supreme Court's constitutional analysis, focusing on the status of the individual defamed and not the newsworthiness of the allegation.

In Gertz, the defendant wrote a defamatory article about an attorney who represented a police officer's family in a murder trial. 418 U.S. at 326. The Court rejected a subject matter (or newsworthiness) analysis because it failed to sufficiently protect the constitutional interest in a private person's

reputation. See id. at 345-46. The Court thereby overruled its previous decision in Rosenbloom. See id. Moreover, the Court expressly refused to extend the actual malice requirement of New York Times to defamatory falsehoods involving private individuals, regardless of public interest in the subject matter. See id. The Court followed its reasoning established in New York Times by reaffirming a status-based analysis and overruling its previous decision to apply a newsworthy test.

The Court subsequently reaffirmed Gertz and again renounced the subject matter test. See Firestone, 424 U.S. at 454. In Firestone, the plaintiff filed a defamation suit against Time, Inc. for inaccurately reporting on her divorce proceedings. Id. at 452. The Court rejected the defendant's argument that the actual malice standard should apply because of the public's interest in a divorce characterized as "cause celebre." See id. at 454. The Court noted that it had repudiated the subject matter test in Gertz in favor of a test that focused on the plaintiff's status. See id. at 455-56.

In its most recent rejection of the newsworthiness test, the Court held that a private individual does not become a public figure merely by becoming associated with a newsworthy matter. See Wolston, 443 U.S. at 167. In Wolston, the plaintiff was incorrectly identified as a Soviet agent after failing to appear before a panel investigating Soviet spy

activities. See id. at 159, 162. The Court rejected the defendant's argument that the plaintiff was a public figure who was required to prove that the defamation was made with actual malice. See id. at 165-68. The Court applied its rationale from Gertz and held that "[a] libel defendant must show more than mere newsworthiness to justify application of the demanding burden of New York Times." Id. at 167-68. Thus, consistent with its previous holdings, the Court once again rejected the subject matter test.

"The Supreme Court has established a constitutional framework for protecting freedom of expression in defamation cases in which the standard of protection applied is determined by the status of the person defamed." Dennis J. Dobbels, Comment, Edwards v. National Audubon Society, Inc.: A Constitutional Privilege to Republish Defamation Should be Rejected, 33 Hastings L.J. 1203, 1218 (1982). This framework preserves the constitutional balance between the public's interest in freedom of expression and an individual's interest in protecting his or her reputation. In contrast, the Edwards test, which was established one year after the Supreme Court's explicit rejection of the newsworthiness standard in Firestone, fails to effectively weigh these competing interests because it only cursorily considers the status of the person defamed. This

Court should follow the framework adopted by the Supreme Court and decline to adopt the neutral reportage privilege.

B. The Neutral Reportage Privilege Is Inconsistent With The California Constitution.

The expansive immunity provided by the neutral reportage privilege runs contrary to California's Constitution, which holds a person liable for irresponsible publication of defamatory statements. Following the Supreme Court's rationale, this Court should refuse to adopt the privilege because it fails to consider the delicate balance between societal and individual constitutional rights.

The California Constitution states that "[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Cal. Const. art. I, § 2, subd. (a). Thus, California's Constitution recognizes the principles of the First Amendment, but expressly provides constitutional protections for an individual's reputation. See id. This constitutional protection, coupled with the necessity of imposing responsibility for the abuse of the right of freedom of expression, should persuade this Court to reject the adoption of the neutral reportage privilege in California.

In Edwards, the Second Circuit created a standard that immunizes a reporter from liability for defamation so long as the defamatory statements are newsworthy and affect the public welfare. 556 F.2d at 120. The Edwards court concluded that the public's interest in newsworthy information outweighs an individual's interest in his or her reputation. See Dobbels, 33 Hastings L.J. at 1210. This analysis is not only inconsistent with the Supreme Court's First Amendment framework, but it is also inconsistent with California's Constitution. Accordingly, this Court should reject adoption of the neutral reportage privilege.

The California Constitution, like the Supreme Court in Gertz, recognizes the importance of an individual's reputation, as well as the value in holding the media responsible for abusing the boundaries of freedom of expression. As this Court has observed, the California Constitution demands recognition of the value of an individual's reputation. See Brown, 48 Cal. 3d at 727 (citing Cal. Const. art. I, § 2, subd. (a)). The neutral reportage privilege only incidentally considers the differentiation between public and private individuals' reputations. Consequently, extending the privilege to all individuals without differentiating on the basis of status, would prevent any person from recovering for a defamatory statement republished by a media defendant, so long as the

defamation was newsworthy. Adoption of the neutral reportage privilege in California would contradict this state's policy of protecting an individual's reputation, a tenet recognized by this Court in its previous holding in Brown.

C. Extension Of The Neutral Reportage Privilege To Private Individuals Is Inconsistent With Existing Public Policy.

The neutral reportage privilege should not be adopted in California. If this Court were to adopt the privilege, however, despite its shortcomings, this Court should find that the privilege only extends to publications concerning public figures. Accordingly, because Mr. Khawar is a private figure, this Court should find that the privilege is inapplicable in this case.

This Court has held that "a publication or broadcast by a member of the news media to the general public regarding a private person is not privileged." Brown, 48 Cal. 3d at 727. In Brown, this Court rejected the public interest privilege which provides immunity for publication of defamatory statements relevant to the public interest. See id. at 756. This Court rejected the privilege because it granted overly-expansive constitutional protections to the media and placed unjustifiably severe limitations on private plaintiffs seeking recovery for defamation. See id. at 721, 744. Although in Brown this Court applied the public interest privilege, rather than the neutral

reportage privilege, an analogy is appropriate because both doctrines seek to expand constitutional protections for the media. Like the public interest test rejected in Brown, Edwards' neutral reportage privilege undermines the constitutionally guaranteed privacy rights of private individuals and should likewise be rejected.

Moreover, as this Court has noted, "private individuals have less opportunity than public officials and public figures to effectively counteract false statements and are more vulnerable to injury." Id. at 744. The Supreme Court has also noted that private individuals have

relinquished no part of [their] interest in the protection of [their] own good name, and consequently [they have] a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.

Gertz, 418 U.S. at 345. Accordingly, to protect private individuals from injury, this Court should not adopt the neutral reportage privilege.

Significant social values fundamental to the law of defamation also support the preclusion of the neutral reportage privilege to private individuals. "Society has a pervasive and strong interest in preventing and redressing attacks upon reputation." Rosenblatt, 383 U.S. at 86. As Justice Stevens commented, "[t]he destruction that defamatory falsehood can

bring is, to be sure, often beyond the capacity of the law to redeem. Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored." Id. at 93-94. Eliminating the ability of victims of defamation to seek legal redress would be contrary to the spirit of the United States and California Constitutions. Accordingly, even if this Court adopts the neutral reportage privilege in California, public policy and the constitutionally guaranteed privacy rights of individuals should bar the extension of the privilege to private figures.

D. Even The Court That Created The Neutral Reportage Privilege Has Noted That The Privilege Should Be Narrowly Construed.

Subsequent to its ruling that public interest in newsworthy information may outweigh a private individual's right to an unsullied reputation, the Second Circuit revisited the neutral reportage issue and limited the scope of the protection it conferred. See Cianci v. New Times Publ'g Co., 639 F.2d 54, 69 (2d Cir. 1980). This Court, like the Second Circuit, should recognize the doctrinal uncertainty created by the neutral reportage privilege, and refuse to apply such an expansive media protection to this state.

In Cianci, the defendant reported that the mayor of Providence, Rhode Island had been accused of raping a woman who

agreed to drop the charges following a \$3,000 settlement. See id. at 56. Although the story did report that the mayor denied the charge, it did not contain his version of the facts. See id. at 69. The Second Circuit noted that "[w]hile the Supreme Court has not yet addressed the question of the existence of a constitutional privilege of neutral reportage, . . . this circuit is on record that the media enjoy such a privilege with respect to public officials or figures." Id. at 67. The court further noted that "the precise bounds of the privilege remain to be delineated." Id. at 69. The court then espoused a narrow construction of the privilege, stating that the Edwards opinion "did contain important suggestions that the privilege was limited in scope and required careful examination of the facts in each case." Id. at 68. The court agreed that the mayor was a public figure, but found that, unlike the defendant in Edwards, the magazine had failed to take a neutral stance on the allegations. See id. at 69. The court concluded, "[t]he need for the careful limitation of a constitutional privilege for fair reportage is demonstrated by the breadth of the defense, which confers immunity even for publishing statements believed to be untrue." Id. Accordingly, this Court should not adopt a privilege that its creators believe to be limited in scope and application.

IV. EVEN IF THIS COURT ADOPTS THE NEUTRAL REPORTAGE PRIVILEGE, IT IS NOT A DEFENSE FOR GLOBE'S CONDUCT IN THIS CASE.

Four necessary elements must be demonstrated to establish the neutral reportage privilege as delineated in Edwards: (1) the charges must be newsworthy and must create or be associated with a public controversy; (2) the charges must be made by a responsible and prominent source; (3) the charges must be reported neutrally and accurately; and (4) the charges must be made about a public official or public figure. See Edwards, 556 F.2d at 120. Even if this Court adopts the neutral reportage privilege, Globe cannot meet this burden. Accordingly, this Court should deny Globe a neutral reportage privilege defense and find Globe liable for defamation against Mr. Khawar.

A. Globe Has Not Satisfied the Neutral Reportage Privilege Requirement That The Allegations Against Mr. Khawar Be Both Newsworthy And Associated With A Public Controversy.

The neutral reportage privilege requires that the allegations made against a defamation plaintiff be newsworthy and be associated with a public controversy. See Edwards, 556 F.2d at 120. The allegation that Mr. Khawar was part of a completely unsubstantiated conspiracy to assassinate Senator Kennedy is not newsworthy. John McSweeney, a forty year veteran of the news business, testified that he would not consider Morrow's theory to be newsworthy because the assassination

occurred more than twenty years ago. (R.T. 868, 861.) Furthermore, Globe published the article almost six months after Roundtable distributed Morrow's book. (C.T. 138-39.) If Morrow's theory were truly newsworthy, surely Globe would have published a report on it immediately, rather than waiting six months. Globe's delay suggests that it used the article as a filler. Moreover, "a constitutional privilege of neutral reportage is not created . . . merely because an individual newspaper . . . decides that a particular statement is newsworthy." Dickey v. CBS Inc., 583 F.2d 1221, 1226 (3d Cir. 1978). Accordingly, this Court should find that the article fails to satisfy the first requirement of the neutral reportage privilege.

There is no existing public controversy surrounding Mr. Khawar's role in Senator Kennedy's assassination. Though a legitimate public controversy may arise if new evidence surfaces, the allegations made against Mr. Khawar were not substantiated by any evidence. (R.T. 2152.) One expert testified that his investigations led him to the conclusion that absolutely no evidence existed to support the allegations made against Mr. Khawar. (R.T. 2152.) Moreover, the assassination and the ensuing controversy occurred in 1963, more than twenty years prior to Globe's article. Additionally, a man named Sirhan Sirhan has been convicted of the assassination. The fact

that Mr. Khawar could not have been the true assassin is corroborated by Robert A. Houghton, the chief detective supervising the investigation of Senator Kennedy's assassination. Mr. Houghton testified that based on a video of the assassination, and on an analysis of Mr. Khawar's physical location surrounding the assassination, it is impossible that Mr. Khawar could have been in the area when and where Senator Kennedy was shot. (R.T. 950-56.) Accordingly, this Court should find that Globe did not print a newsworthy charge about an existing public controversy when it printed Morrow's theory.

B. Globe Has Not Satisfied The Neutral Reportage Privilege Requirement That The Allegations Be Made By A Responsible And Prominent Source.

The neutral reportage privilege requires that allegations made against a defamation plaintiff stem from a responsible and prominent source. See Edwards, 556 F.2d at 120. Morrow should not be considered a prominent source. Robert Blair Kaiser, a columnist and author of a book chronicling the assassination of Senator Kennedy, testified that he was "incredulous" because he thought that Morrow was simply not "playing with a full deck" and had "zero credibility." (R.T. 2151-52.) Mr. Kaiser stated that Morrow had no real evidence to support his hypothesis that Mr. Khawar shot Senator Kennedy. (R.T. 2152.) Mr. Kaiser also testified that the evidence from his own investigation showed that Mr. Khawar was never in the pantry area during Senator

Kennedy's assassination. (R.T. 2152.) Globe's distribution of more than two and a half million copies of an article based on Morrow's discreditable theories cannot be justified. (R.T. 1861.) Morrow irresponsibly charged Mr. Khawar with the assassination of Senator Kennedy, despite a lack of evidence proving the allegations. Accordingly, this Court should find that unsubstantiated allegations directed at Mr. Khawar do not make Morrow a responsible source.

C. Globe Has Not Satisfied The Neutral Reportage Privilege Requirement That The Allegations Be Reported Neutrally And Accurately.

The neutral reportage privilege requires that allegations made against a defamation plaintiff be reported neutrally and accurately. See Edwards, 556 F.2d at 120. Globe's allegation that Mr. Khawar assassinated Senator Kennedy is reported neither neutrally nor accurately. John Blackburn, the author of the Globe article, failed to make a good faith attempt to contact Mr. Khawar and investigate Morrow's charges, thereby publishing a biased and inaccurate item. Accordingly, Globe fails to meet the third requirement of the neutral reportage privilege.

1. Globe neglected to follow customary industry practices to ensure the accuracy of its article.

Blackburn did not adhere to the established code of conduct for journalists. According to the Statement of Principles of the American Society of Newspaper Editors, "[e]very effort must

be made to assure that the news content is accurate." Brown, 48 Cal. 3d at 732 (quoting Swain, Reporter's Ethics (1978) p.112). In Brown, this Court quoted the Code of Ethics of Sigma Delta Chi, The Society of Professional Journalists, and reaffirmed the standard that "there is no excuse for inaccuracies or lack of thoroughness." Id. Globe's failure to follow industry standards should preclude a finding that the article was neutral and accurate.

Several expert witnesses testified that Blackburn ignored the tenets of professional journalism when writing the Globe article. Mr. McSweeney, a veteran of the news business, stated that Blackburn's article had little basis to it. (R.T. 795.) He further testified that the article was "sloppy," "unbalanced," "vague about the attribution" and falls below the standards of the industry. (R.T. 831.) Mr. McSweeney additionally stated that in accordance with respectable industry practices, Blackburn should have made a diligent effort to interview Mr. Khawar and offer him the opportunity to refute the charges. (R.T. 872-75.); see also, Cianci, 639 F.2d at 69. Instead, Blackburn accused Mr. Khawar of a serious crime and then "[left him] hanging out there to dry." (R.T. 871.) Blackburn made only one phone call to Los Angeles Directory Assistance, asking for the number of Ali Ahmand. (R.T. 1121-22.) Had Blackburn followed conventional journalistic

practices, he could have found Mr. Khawar by asking for the number of Khalid Iqbal, Mr. Khawar's name according to Pakistani custom, and the other name Morrow used to identify Mr. Khawar in the index of his book. (R.T. 1383; 1122.) Moreover, Blackburn could have called the head of the assassination investigation, Mr. Houghton, to verify Morrow's allegations. Mr. Houghton, however, testified that he never received any investigative calls from anyone at Globe. (R.T. 957.)

Even the trial judge found that Globe's article was biased and inaccurate. (R.T. 2740.) The trial judge noted that although it is impossible to identify Mr. Khawar in the photographs in Morrow's book, by retouching, lightening and increasing the size of the same photos, Globe created an image to finger Mr. Khawar, without cause, as the assassin of Senator Kennedy. (R.T. 2742-44.) Thus, Blackburn's failure to follow the code of ethics established for all journalists resulted in a biased and inaccurate report of Morrow's charges against Mr. Khawar. Accordingly, this Court should hold Globe to industry practices and find that it failed to produce an neutral and accurate article.

2. Republication of a defamatory statement originally made by another is not a defense to liability.

This Court should reject Globe's claim that it is not liable to Mr. Khawar merely because it republished Morrow's

conspiracy theories and was not, therefore, the original publisher of the libelous statements. "American courts have traditionally refused to distinguish between publishers and republishers of defamatory statements, on the theory that 'tale bearers are as bad as tale makers.'" Barry v. Time, Inc., 584 F. Supp. 1110, 1122 (N.D. Cal. 1984) (quoting McDonald v. Glitsch, Inc., 589 S.W.2d 554, 556 (Tex. Civ. App. 1979)). Globe's unverified republication of Morrow's conspiracy theory does not immunize Globe from liability for breaching constitutionally guaranteed privacy rights. Accordingly, this Court should find that Globe cannot shield itself from liability merely because it was not the original publisher of the defamatory statements.

D. Globe Has Not Satisfied The Final Requirement Of The Neutral Reportage Privilege That The Allegations Concern A Public Official Or Public Figure.

The neutral reportage privilege requires that the defamatory allegations be made against a public official or public figure. See Edwards, 556 F.2d at 120. Because Mr. Khawar is a private figure, any assertion of the neutral reportage privilege is inappropriate. Accordingly, the court below properly held that Globe is precluded from asserting a defense of neutral reportage privilege.

CONCLUSION

This Court should affirm the lower court's finding that Mr. Khawar is a private figure. His mere association with the assassination did not elevate him to public figure status. Moreover, Mr. Khawar provided substantial evidence to support the jury's finding of actual malice. Thus, this Court should affirm the award of punitive damages in Mr. Khawar's favor.

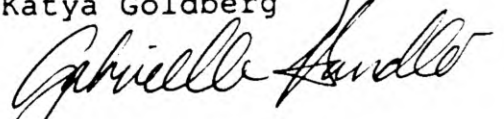
This Court should not adopt the neutral reportage privilege because it is inconsistent with constitutional protections for defamation plaintiffs. If this Court does adopt the neutral reportage privilege, however, this Court should affirm the holding of the court below and find that Globe's failure to meet the privilege's requirements bars the assertion of the privilege.

For the foregoing reasons, the lower court's decision should be affirmed.

Dated: October 28, 1997

Respectfully Submitted,


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